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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Mohan Vallabhapurapu; Ron Sarfaty; Kenneth Kilgore; Tyrey Mills, a minor, by and through his next friend and mother Ginene Mills; Jenilyn Jimenez; Elizabeth Baker; William Farber; Uverda Harry; Daniel Hernandez; Kathryn Tyler; Priscilla Walker; Richard Felix; Kathleen Gonzalez; Judy Cutler; Diane Dailey; Carol Lacher; Bethany McClam; Erik Nieland; Carol Picchi; William Showen; Anne Casey; George Partida; Kitty Dean; Alfred Brown; Marsha Shining Woman; Goldene Springer; and Daniel Xenos on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Burger King Corporation,

Defendant.

Case No. C-11-00667 WHA

PLAINTIFFS' OPPOSITION TO DEFENDANT BURGER KING CORPORATION'S MOTION TO DISMISS AND TO ADD FRANCHISEES/LESSEES AS ADDITIONAL DEFENDANTS

Date: May 5, 2011
Time: 2:00 p.m.
Courtroom: Courtroom 9, 19th Floor
Judge: Hon. William H. Alsup

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have brought this putative class action against Burger King Corporation ("Burger King") to challenge architectural barriers and the policies that enable such architectural barriers at eighty-six Burger King-leased restaurants ("BKLs") throughout California, in violation of federal and state access laws. The action alleges that Burger King is directly liable for these barriers as the lessor/sublessor of the restaurants. Burger King now brings a motion to compel joinder of the franchisees/lessees ("Franchisees") of these BKL restaurants and to dismiss the claims relating to restaurants the named Plaintiffs have not visited.[1]

Burger King's request to join the franchisees should be denied. In the prior, related case of *Castaneda v. Burger King*, the Court determined that the franchisees should be joined under Rule 20, not Rule 19 as requested here. They were never made parties to the lawsuit, however, because they would not agree to the case's trial schedule. When the Court decided the joinder issue in *Castaneda*, it did not have the benefit of complete knowledge regarding what Burger King could accomplish with respect to injunctive relief, or the franchisees' preference regarding joinder. Now, after Burger King represented to the Court that it could accomplish the significant, "model" injunctive relief agreed to in the *Castaneda* settlement, it complains that the similar injunctive relief requested here cannot be accomplished. Burger King's protestations are inconsistent with the facts.

Plaintiffs have pled a case against Burger King Corporation. The Franchisees are not necessary parties and should not be joined. Burger King has demonstrated no prejudice to any of the existing parties if the franchisees are not joined. Burger King's potential for indemnification from the Franchisees is irrelevant to the issues in this case and is no excuse for disrupting this action. The Court should not permit Burger King to avoid its statutory responsibility for

[1] As discussed *infra* Section IV.A, despite confusing language, it appears that Burger King's Motion to Dismiss is addressed only at the limited-barrier class that addresses *all* Remaining BKLs and the Motion to Add Franchisees is not a part of the Motion to Dismiss.

compliance with the laws regarding accessibility by abdicating its obligations and liability to the franchisees.

Burger King's motion to dismiss the claims against BKLs not visited by the Plaintiffs should also be denied. Burger King's fundamental error is its contention that the scope of this case is determined by the standing of the named Plaintiffs, rather than the standing of the class as a whole. To the contrary, it is settled class action law that once a class is certified, the scope of the case is based on the standing of the class as a whole. Whether the class in this case will be certified depends on whether it meets the requirements of Federal Rule of Civil Procedure 23, a question that is not yet properly before this Court. Plaintiffs have alleged a single limited-barrier class action against Burger King for the single injury of denial of equal access to public facilities. Burger King presents no case law supporting its argument that such a claim cannot stand as a matter of law at the pleadings stage.

II. LEGAL CONTEXT

Title III of the Americans with Disabilities Act forbids discrimination against disabled individuals in public accommodations. 42 U.S.C. §§ 12181-12189. Title III prohibits disability discrimination by those who own, operate, lease, or lease to places of public accommodation such as the BKL restaurants. 42 U.S.C. §§ 12181(7)(B) (restaurants are places of public accommodation), 12182(a) (anti-discrimination provision). Among the forms of discrimination prohibited by Title III is using "directly or through contractual or other arrangements, . . . criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(3)(i). Discrimination is further defined to include, *inter alia*, "a failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable"; "a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities"; and "a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use

wheelchairs." 42 U.S.C. 12182(b)(2)(A)(iv); 12183(a); *see also Castaneda v. Burger King Corp.* (*Castaneda I*), 597 F. Supp. 2d 1035, 1040-41 (N.D. Cal. 2009) (citing same).

Two state statutes prohibit discrimination on the basis of disability in the full and equal access to the services, facilities and advantages of public accommodations. Cal. Civ. Code §§ 51(b) (Unruh), 54.1(a)(1) (CDPA); *see Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 606 (N.D. Cal. 2009). A violation of the ADA also violates both statutes. *See* Cal. Civ. Code §§ 51(f), 54(c); *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 670-73 (2009). A prevailing plaintiff is entitled to statutory minimum damages of $4,000 for each violation of the Unruh Act, or statutory minimum damages of $1,000 for each violation of the CDPA. Cal. Civ. Code §§ 52(a) (Unruh), 54.3(a) (CDPA). "[P]roof of actual damages is not a prerequisite to recovery of statutory minimum damages" under the CDPA and Unruh Act. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000).

III. FACTS

On February 14, 2011, Plaintiffs filed this action on behalf of themselves and all similarly situated wheelchair and scooter users against Burger King Corporation. They allege that Burger King is liable under the ADA, Unruh, and the CDPA for unlawful barriers to access at BKL restaurants throughout California. The complaint alleges that Burger King is directly liable as a lessor/sublessor of these restaurants, and also that Burger King exercises control over the construction, alteration, repair and maintenance, and operation of these restaurants. Although each of the restaurants at issue in the present case is franchised, the Franchisees have not moved to intervene in this case.

Plaintiffs are Burger King customers who use wheelchairs or scooters. Complaint ¶¶ 13-39 (Dkt. #1). They have encountered common barriers at a number of BKLs in California. *Id.* ¶¶ 79-159. These barriers include entry and restroom doors that were very difficult to open, parking lots with insufficient or inadequate accessible parking spots, inaccessible restrooms, narrow or steep sidewalks and ramps, queue lines that were too narrow for their wheelchairs to navigate, and soda machines and condiments that were difficult for them to reach. *Id.* They have alleged separate subclasses for each restaurant they visited prior to filing this lawsuit and a

single, limited-barrier class for all BKLs throughout California that were not a part of *Castaneda v. Burger King*, Case No. 08-cv-4665 WHA ("Remaining BKLs"). *Id.* ¶¶ 41, 52.

There are over 600 Burger King restaurants in California. With respect to approximately 96 of these BKLs, Burger King either owns the building and leases it to a Burger King Franchisee or leases the building from the landlord and then sub-leases it to a Burger King franchisee. Mem. of P. & A. in Supp. of Def. Burger King Corp.'s Mot. to Dismiss at 5 n.7 (Dkt. #15, "Def. Mem."). This makes Burger King liable for any violations of Title III at those restaurants. *See* 42 U.S.C. § 12182(a) (prohibiting discrimination by those who lease or lease to places of public accommodation). There are 86 Remaining BKLs, as 10 were subject to the *Castaneda* settlement.

On July 12, 2010, this Court approved the settlement in the related case, *Castaneda v. Burger King*, which involved similar allegations regarding ten California BKLs (which are not a part of this lawsuit). *Castaneda v. Burger King Corp.* (*Castaneda III*), 2010 WL 2735091 at *2 (N.D. Cal. July 12, 2010). That settlement agreement involved substantial injunctive relief and $5 million in damages to a class of approximately 300 individuals. The injunctive relief involved the following elements:

1. Immediate work to be done to the ten restaurants pursuant to results of the expert inspections. Revised Settlement Agreement ¶ 6 (*Castaneda* Dkt. #359; "*Castaneda* Settlement") (also Declaration of Kurt Franklin in Support of Specially Appearing Franchisees' Opposition to Burger King Corporation's Motion to Add Franchisees/Lessees as Additional Defendants ("Franklin Decl."), Ex. B (Dkt. #29-2)).
2. Changes to daily operations. Burger King provided to all of the ten BKLs a daily checklist to ensure that the moveable items were in compliance with the law. Burger King also modified its manual better to ensure compliance. *Castaneda* Settlement ¶ 7.1.1
3. Tri-annual surveys. Burger King agreed to surveys every three years of the ten BKLs. *Castaneda* Settlement ¶ 7.1.2.

4. Surveys upon remodel. Burger King agreed to ensure compliance with the law at the time of successor remodels to ten BKLs. *Castaneda* Settlement ¶ 7.1.3.

The settlement agreement between Burger King and the *Castaneda* plaintiffs therefore involved injunctive relief that was effective on an immediate, daily, tri-annual, and twenty-year basis. Burger King demonstrated its ability to ensure compliance with the law by agreeing to this comprehensive, extensive, and largely uniform relief.

Burger King exercises substantial control over the BKLs, both as a franchisor and a lessor. As explained by the Franchisees,

> Burger King Corporation exercises substantial control over . . . BKL restaurant[s]. For example, Burger King Corporation exerts control over things like the design of [the] restaurant[s], the equipment and furniture used in [the] restaurant[s], the operational standards, the menu, and the hours of operation. All construction or improvement at . . . BKL restaurant[s] must be authorized and approved by Burger King Corporation. . . . Burger King Corporation conducts periodic inspections of . . . BKL restaurant[s].

Declaration of Joe Rubin ¶¶ 4-5 (Dkt. #31; "Rubin Decl."); *accord* Declaration of Rakesh Patel ¶¶ 3-4 (Dkt. #30; "Patel Decl."); Declaration of Willie C. Cook ¶¶4-5 (Dkt. #32; "Cook Decl."). Starting in 2008, Burger King has also entered franchise restaurants and made improvements it deems are necessary. Rubin Decl. ¶¶ 7-10; Patel Decl. ¶¶ 6-10; Cook Decl. ¶¶ 7-13.

The Lease/Sublease Agreements also grant Burger King the right to make necessary alterations and to enter the BKL restaurants for that purpose: "In the event that Lessee fails or neglects to make all necessary Repairs or fulfill its other obligations as set forth above, Lessor or its agents may enter the Premises for the purpose of making such Repairs or fulfilling those obligations." Declaration of Thomas G. Archer in Support of BKC's Motion to Dismiss ("Archer Decl.") Exs. A-E (Dkt. #23) § 5.2.

On October 5, 2010, a group of BKL franchisees filed an action for declaratory relief regarding Burger King's attempts to enforce an indemnity agreement against those franchisees for attorneys' fees and costs incurred during *Castaneda*. *Newport, et al. v. Burger King*

Corporation, 10-cv-4511 WHA. That case has since been related to *Castaneda*, such that all three cases are in front of this Court.

IV. ARGUMENT

Plaintiffs first address Burger King's Motion to Add the Franchisees/Lessees as Additional Parties and then Burger King's Motion to Dismiss.

A. Standard of Review

Plaintiffs bring their claims under the ADA and state civil rights laws to remedy barriers to access for individuals who use wheelchairs. Because this is a civil rights case, the Complaint is to be liberally construed. *Holley v. Crank*, 400 F.3d 667, 674 (9th Cir. 2005).

Burger King's portrayal of this motion is confusing. At times, it describes the joinder request as a motion to dismiss for failure to join necessary parties. Throughout its motion, however, it appears that Burger King is not moving to dismiss the complaint for failure to join parties, but rather simply requesting joinder. Plaintiffs therefore address the two issues—joinder and dismissal—as separate motions, although in one brief. Additionally, Burger King titles its motion as one "to dismiss complaint" but instead only requests that the Court dismiss *claims* against Burger King for restaurants that the named Plaintiffs have not visited. Even if Burger King were to prevail on this motion, the result would be simply that Plaintiffs' limited-barrier class against Burger King for *all* of the "remaining BKLs" would be dismissed. All named Plaintiffs and all subclasses pled in the Complaint would remain intact.

Burger King relies on Rule 12(b)(1) for its motion to dismiss. As this Court explained in *Castaneda*, "[a] jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence." *Castaneda I*, 597 F. Supp. 2d at 1040 (citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)). Where, as here, the Rule 12(b)(1) motion is a facial attack—arguing that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction because the ADA is inherently "site specific"—a district court must accept all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)).

B. The Franchisees Should Not Be Joined as Defendants

Burger King moves pursuant to Federal Rule of Civil Procedure 19 to join the Franchisees as defendants. The Franchisees are not "necessary" parties under Rule 19(a) and should not be joined in this lawsuit. A party is necessary if either (1) the present parties will be denied complete relief in the absence of the party to be joined, or (2) the absent party will suffer some loss or be put at risk of suffering such a loss if not joined. *See* Fed. R. Civ. P. 19(a). First, as demonstrated by the settlement in *Castaneda v. Burger King Corporation*, to which the Franchisees were not parties, the Court "can accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). In *Castaneda*, Burger King agreed to substantial injunctive and monetary relief, which this Court approved. Burger King now seeks to convince the Court that similar relief requested in this case would not be effective, despite its representation to the Court of its ability to comply with the prior settlement agreement.

Second, under Ninth Circuit authority, the Court cannot consider the Franchisees' potential loss under Rule 19(a)(1)(B) unless they have asserted an interest in joining this lawsuit. As they have not done so, all considerations of prejudice to the franchisees are irrelevant.

Additionally, the Franchisees should not be joined under Rule 20, as their joinder would prejudice Plaintiffs' case. If, however, the Court orders the Franchisees joined as defendants, Plaintiffs request that the Court order separate trials to limit the prejudice to Plaintiffs and order production of certain information—such as surveys performed in 2008 and 2009—to permit Plaintiffs to make informed claims against the Franchisees given the different statutes of limitation that would apply to claims against BKC and the Franchisees. *See infra* n.4.

Joinder here is not proper under Rule 19 and is prejudicial under any other rule. It converts a statutory dispute into a contractual one, and turns a strict liability case into a negligence case.

1. Joinder Under Rule 19 Is Improper as the Franchisees Are Not Necessary Parties.

a) The Court Can Accord Complete Relief Among the Existing Parties, as Demonstrated by Castaneda v. Burger King.

Here, "the court can[] accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). "In conducting the Rule 19(a)(1) analysis, the court asks whether the absence of the party would preclude the district court from fashioning meaningful relief as between the parties." *Disability Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004). "The term 'complete relief' used in Rule 19(a) 'refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought.'" *First Nat'l Montana Bank of Missoula v. Federal Leasing, Inc.*, 110 F.R.D. 675, 677 (D. Mont. 1986) (quoting 3A Moore's Federal Practice § 19.07-1(1) at 19-128). In other words, the relevant consideration regarding "complete relief" is whether Plaintiffs can obtain the complete relief they seek from Burger King, not whether the Franchisees will subsequently be responsible to Burger King for any reimbursement of this relief.

Although liability between Burger King and the Franchisees is joint and several, that does not require, or even counsel for, joinder. Where there is more than one party with responsibility, if that responsibility is joint and several, as it is here, Plaintiffs are entitled to choose their defendant. *SASCO v. Byers*, 2009 WL 1010513, at *3 (N.D. Cal. Apr. 14, 2009) ("[B]ecause each tortfeasor is jointly and severally liable, the plaintiff may choose whom he wishes to sue; if the plaintiff elects to sue fewer than all defendants, those sued cannot compel joinder of the other tortfeasors."); *see also Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000) ("Since joint tort-feasors are jointly and severally liable, the victim may sue as few of the alleged wrongdoers as he chooses, and those left out of the lawsuit are not 'indispensable parties.'"). Because complete relief is possible against one jointly and severally liable defendant, the other jointly and severally liable third parties need not be joined.

Complete relief against Burger King is demonstrably possible without joinder. As in *Castaneda*, Burger King could be ordered to comply with the ADA to the extent that its control

over the restaurants allows and to pay statutory damages. *See Disability Rights Action Comm.*, 375 F.3d at 879-80 (noting that the requirement that removal of barriers be limited to those that are "readily achievable" can take into account a defendant's relationship to the facility or facilities in question). In *Castaneda*, Burger King agreed to ensure compliance with the ADA and to institute policies to ensure compliance with the ADA as to the ten BKLs going forward.

Under the contracts between Burger King and the Franchisees, the Franchisees have to comply with Burger King's rules. *See, e.g.*, Declaration of Julia Campins in Support of Plaintiffs' Opposition to Defendant Burger King Corporation's Motion to Dismiss and to Add Franchisees/Lessees as Additional Defendants (Campins Decl.) Exs. 1-3 (sample franchise agreements). Furthermore, the Franchisees must make alterations to comply with Burger King's "image" and obtain prior written consent from Burger King for any alterations. Archer Decl. Exs. A-E § 5.3. Burger King has obligations under the *Castaneda* settlement agreement, including ensuring compliance with the laws regarding disability access through surveys, policy changes affecting the franchisees, and supervision of remodels and alterations. *See Castaneda III*, 2010 WL 2735091 at *2. In *Newport*, Burger King has filed counterclaims against certain Franchisees for failure to fulfill the obligations of their contracts. *Newport* Dkt. #41 (also Franklin Decl. Ex. C, Dkt. #29-3). At no point in *Newport*, however, has Burger King alleged that it was unable to effectuate the injunctive relief agreed to in *Castaneda*. *Id.* Because such a claim would be part of the same transaction or occurrence as the claims in *Newport*, Fed. R. Civ. P. 13(a)(1), it can be presumed that Burger King has experienced no resistance to compliance with its injunctive relief obligations under the *Castaneda* settlement.

Burger King's protestation regarding the Franchisees' purported right to quiet enjoyment of their premises is further belied by the Lease clause that explicitly states, "In the event that Lessee fails or neglects to make all necessary Repairs or fulfill its other obligations as set forth above, Lessor or its agents may enter the Premises for the purpose of making such Repairs or fulfilling those obligations." Archer Decl. Exs. A-E (Lease) § 5.2. Burger King additionally has the general right to enter any BKL during "reasonable hours of any business day to ascertain if the Premises are in proper repair and condition." *Id.* § 5.6. Indeed, one of the "obligations" of

the Lease is to comply with the law, including explicitly the ADA. *Id.* § 5.7.[1] Thus, any purported right of the Franchisees to "quiet enjoyment" is explicitly subject to the BKLs' compliance with the law and Burger King's requirements.

This reading of the Franchise and Lease Agreements is consistent with the *Castaneda* settlement. As outlined above, Burger King agreed to, and represented to the Court its ability to comply with, substantial injunctive relief in the *Castaneda* settlement. That settlement included changes to Burger King's daily procedures at the restaurant level, immediate fixes to restaurants, and new procedures on a tri-annual and twenty-year basis to ensure compliance with federal and state disability access laws. *Castaneda III*, 2010 WL 2735091 at *2. As the *Newport* plaintiffs explain, in settling *Castaneda*, Burger King made "changes to its policies and practices to effect broader relief." Specially Appearing Franchisees' Opposition to Burger King Corporation's Motion to Add Franchisees/Lessees as Additional Defendants at 4:26-28 (Dkt. #28). This settlement proves that injunctive relief against Burger King alone with respect to the remaining BKLs is both possible and effective.

The settlement agreement did not involve the franchisees. Moreover, the class's injunctive relief was not hindered by the fact that the Franchisees were not a party to the case or to the settlement. As one disability access expert explained, the *Castaneda* settlement was "exemplary" and will become the model for future agreements in cases involving chain restaurants. *Castaneda* Dkt. #350 at 9 (citing Declaration of Claudia Center ¶ 10 (Dkt. #354)). It is not only too late, but also factually incorrect, for Burger King now to claim that complete injunctive relief is not possible and that the Franchisees are required for any injunctive relief.

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[1]That section reads:

> Lessee shall, at its own cost and expense, promptly observe and comply with all present and future laws, ordinances, requirements, orders, directions, rules and regulations (referred to generally as "regulations") of governmental authorities having or claiming jurisdiction over the Premises or the conduct of Lessee's business. By way of example, and not limitation, compliance with governmental regulations shall include, but not be limited to, the following: (i) alterations and/or additions to the Premises if required under the Americans With Disabilities Act of 1990 . . . .

Moreover, joinder is unnecessary because the franchisee defenses that Burger King seeks to join are already the subject of separate litigation in Newport, thus making joinder in the instant case unnecessary. *See* Defendant/Counter-Claimant Burger King Corporation's Counterclaim for Damages at Counts I-III (*Newport* Dkt. #41).

b) The Franchisees Have No Interest in Being Parties to this Lawsuit.

Burger King also argues that the Franchisees should be joined under Rule 19(a)(1)(B). Burger King spends considerable space explaining the Franchisees' interest in being parties to this lawsuit. Noticeably absent from this recitation of hypothetical interest is any actual, expressed interest from the Franchisees themselves, which the Ninth Circuit requires prior to finding a party necessary under Rule 19(a)(1)(B). *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (9th Cir. 1983) (stating that joinder is "contingent . . . upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action" and that failure to assert that interest renders a party not "necessary"); *In re Wells Fargo Residential Mortgage Lending Discrim. Litig.*, 2009 WL 2473684, at *2 (N.D. Cal. Aug. 11, 2009) ("[T]he Ninth Circuit has held joinder is improper when the absent party has not claimed it has an interest in the action."). Indeed, many of the Franchisees have filed an *opposition* to Burger King's motion. *See* Dkt. #28-32. Hypothetical and unsubstantiated interest is insufficient to cause the franchisees to be "necessary" parties. *See Northrop Corp.*, 705 F.2d at 1046; *see also Procurador de Personas con Impedimentos v. Municipality of San Juan*, 541 F. Supp. 2d 468, 474-75 (D.P.R. 2008) (merely asserted interest of third party property owners and business operators does not demonstrate that they have "sufficient interest to render them necessary parties"). Burger King cannot assert the Franchisees' interest for them, or in the face of their explicit disinterest. *See In re County of Orange*, 262 F.3d 1014, 1023 (9th Cir. 2001) ("Orange County cannot claim that the districts have a legally protected interest in the action unless the districts themselves claim that they have such an interest, and the districts have been silent.") ((citing *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) ("[I]t is inappropriate for one defendant to attempt to champion the absent party's interests.")).

Burger King also states that the Franchisees are necessary because "as the parties directly responsible for the maintenance and operation of the restaurants, [they] have unique knowledge about the construction and alteration histories of the restaurants." Def. Mem. at 13. First, Burger King offers no explanation why any relevant information cannot be obtained through witness discovery as was done in *Castaneda*. *See In re Wells Fargo.*, 2009 WL 2473684, at *3 ("To the extent Wells Fargo is correct that conduct by the Brokers is relevant to any claim or defense of an existing party, Wells Fargo fails to explain why it is necessary that the Brokers be joined as defendants, as opposed to their officers and/or employees being called as witnesses.").

Second, Burger King is the lessor/sub-lessor of the property, was involved in building the restaurants, and maintains files relating to the construction, alteration, and maintenance of the restaurants. Cook Decl. ¶ 3; Campins Decl. ¶ 3. Moreover, certain BKLs may transfer from one Franchisee to another, while Burger King remains the franchisor. Campins Decl. ¶ 4. In some circumstances, therefore, Burger King has far more comprehensive information regarding the construction, alteration, and maintenance history of restaurants than would many current Franchisees.

Finally, Burger King asserts that there "may be conflicts among the interests of the various franchisees/lessees." Def. Mem. at 13. This asserted conflict of interest is not relevant. It is only a conflict of interest *between the defendant and the putative necessary party* that is relevant to the joinder analysis. *See Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (without conflict of interest, government could adequately represent interests of Indian tribes); *cf. Thompson v. Jiffy Lube Int'l, Inc.*, 505 F. Supp. 2d 907, 919 (D. Kan. 2007) (in analyzing Rule 19(b) for prejudice, holding that because non-party franchisee had interest in conflict with franchisor's position in case, franchisee was indispensible party).

Because the Franchisees have not asserted an interest in being joined in this lawsuit, the Court may not consider their interests under Rule 19(a)(1)(B).

c) The Purported Indemnification Obligation Does Not Make the Franchisees Necessary Parties.

A significant basis for Burger King's motion is the indemnification obligation Burger King claims from the Franchisees. The purported indemnification obligation is irrelevant to the joinder analysis for several reasons. First, the purported indemnification obligation is a hotly contested issue separate from the issues in this case and also the subject of *Newport*, which is already on file. Second, case law firmly establishes that the purported indemnification obligation does not make the Franchisees necessary parties. Third, as joinder under Rule 19(a)(1)(B) is foreclosed absent the Franchisees' expressing interest in joining the litigation, even if the purported indemnification obligation prejudices the Franchisees' rights, this consideration is inapplicable.

In *Newport*, the Franchisees and Burger King are litigating their dispute regarding the application of the indemnification agreements between them. The Franchisees in *Newport* argue that there is an exception to the indemnification agreement for liabilities attributable to Burger King's negligence. Although the *Vallabhapurapu* Plaintiffs intend to demonstrate Burger King's policy of non-compliance with the disability access laws, they need not rely on Burger King's negligence in failing to ensure compliance with these laws, because, as a lessor, Burger King is strictly liable for non-compliance. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000). Any delegation of responsibility among the parties to a contract does not affect Plaintiffs' rights under the disability access laws. *Disability Rights Action Comm.*, 375 F.3d at 873 ("[P]rivate entities otherwise covered by Title III may not avoid their obligations through contract."); H.R. Rep. No. 101-485(II) at 101, 104 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 384, 387 ("[A] public accommodation's obligations are not extended or changed in any manner by virtue of its lease with the other entity."). Thus, the contractual agreements between Burger King and the franchisees/lessees are not relevant to Plaintiffs' rights.

Instead, any indemnification agreement between Burger King Corporation and the Franchisees that requires the Franchisees to pay for Burger King Corporation's liabilities is a matter between those entities which can, and will, be resolved in separate litigation and does not

make the parties to the agreement necessary. *See In re County of Orange*, 262 F.3d at 1022 (absent parties not necessary under Rule 19 because defendant could seek reimbursement in separate action); *Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1054 (3d Cir. 1988) ("A defendant's right to contribution or indemnity from an absent non-diverse party does not render that absentee indispensable pursuant to Rule 19."); *SASCO*, 2009 WL 1010513, at *3 ("In particular, a defendant's possible right of reimbursement, indemnity, or contribution against an absent party is not sufficient to make the absent party indispensable to the litigation.") (citing *Nottingham v. Gen. Am. Commc'ns Corp.*, 811 F.2d 873, 880 (5th Cir. 1987); *Field v. Volkswagenwerk A.G.*, 626 F.2d 293, 298 (3rd Cir. 1980)). As explained below, joinder of these issues to Plaintiffs' case is prejudicial to Plaintiffs because it distracts from the single question of accessibility of the BKLs. Rather than a strict liability case relating to accessibility, Plaintiffs would be litigating a contractual case regarding negligence.

Defendant's cases are decidedly not to the contrary. Indeed, each of Burger King's cases is either conclusively on the side of Plaintiffs—that the Franchisees are not necessary parties—or irrelevant. First, Burger King cites cases in which parties to a contract were necessary parties because the cause of action *itself* directly addressed the contract—actions to set aside the contract or to otherwise invalidate leases. *See Sulit v. Slep-Tone Entm't*, 2007 WL 4169762 (N.D. Cal. Nov. 20, 2007) (action to set aside a contract); *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) (execution of lease); *Burger King Corp. v. Am. Nat'l Bank & Trust Co.*, 119 F.R.D. 672 (N.D. Ill. 1988) (suit by tenant on the lease, ownership at issue). The Lease/Sublease Agreement and Franchise Agreement, while relevant to understand the relationship between Burger King and its Franchisees, are not the center of this case. Rather, this case is concerned with the inaccessibility of California BKLs. *See Disability Rights Action Comm.*, 375 F.3d at 881 (action seeking compliance with the ADA is not an action to set aside a contract). This case is not based on a contract; rather, it is based on Burger King's statutory accessibility obligations under the ADA and state law. As such, Burger King's contract cases are inapplicable.

Second, Burger King cites cases in which the named defendant(s) had no interest or liability, and so entities with liability had to be joined. *See Nat'l Fair Hous. Alliance v. A.G.*

Spanos Const., Inc., 542 F. Supp. 2d 1054 (N.D. Cal. 2008) (named defendant builders had no continuing control or interest in properties); *Beverly Hills Fed. Sav. & Loan Ass'n v. Webb*, 406 F.2d 1275 (9th Cir. 1969) (lack of liability under FHA for named defendants). Here, Burger King is clearly directly liable. *See* Def. Mem. at 5 n.7; 42 U.S.C. § 12182(a) (prohibiting disability discrimination by lessors and lessees of places of public accommodation).

Third, Burger King cites cases in which courts determined either that complete relief could be obtained against already-named defendant tenants or the lessor was the *proper* defendant. *See Emerick v. Kahala L&L, Inc.*, 2000 WL 687662 (D. Haw. May 16, 2000) (tenant was named defendant and court found that, in that instance, complete relief could be obtained against tenant); *Alford v. City of Cannon Beach*, 2002 WL 31439173 (D. Or. Jan 15, 2002) (lessor was not named defendant and court found that lessor was necessary party). These cases are inapplicable; Plaintiffs have named Burger King, the lessor. Burger King is clearly directly liable on the basis of express statutory language, and is capable of effectuating the relief that Plaintiffs request.[2]

Finally, as explained above, joinder under Rule 19(a)(1)(B) is improper unless the party to be joined has asserted an interest in the litigation. As the franchisees have not done so here, Burger King's claims that the Franchisees would be "severely prejudice[d]" because of California's law on claim preclusion, Def. Mem. at 15, is unavailing and irrelevant.

2. Joinder Under Rule 20 Is Unnecessary and Prejudicial.

In *Castaneda*, the Court declined to join the franchisees under Rule 19, but determined that joinder of relevant franchisees would "be useful in efficiently effecting any necessary injunctive relief at the stores under their control," and ordered joinder under Rule 20. *Castaneda v. Burger King Corp.* (*Castaneda II*), 264 F.R.D. 557, 574 (N.D. Cal. 2009) . Federal Rule of Civil Procedure 20 provides: "Persons . . . may be joined in one action as defendants if: (a) any

[2] Burger King's assertion regarding the DOJ's preference for joining premises operators, Def. Mem. at 10 n.11, is irrelevant in this case involving architectural barriers, where Plaintiffs are not challenging operational policies—such as individual refusal to seat disabled patrons—except to the extent the barriers result from, or are affected by, Burger King policies.

right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (b) any question of law or fact common to all defendants will arise in the matter." Although the franchisees may be jointly and severally liable to Plaintiffs for violations of the disability access laws at BKLs, the Court should not join them under Rule 20.[3]

Even when "the specific requirements of Rule 20 . . . [have been] satisfied, a trial court must also examine other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness." *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980). Among those considerations is "the possible prejudice that may result to any of the parties in the litigation." *Id.* Since the Court's ruling on the *Castaneda* joinder motion, *Castaneda II*, 264 F.R.D. at 574, additional facts have developed that demonstrate that the franchisees do not add to the ability to effect necessary injunctive relief. Moreover, their inclusion in this case would be prejudicial to Plaintiffs.

From the perspective of the class, adding the Franchisees is not useful because BKC is jointly and severally liable. As explained above, the *Castaneda* settlement demonstrates that not only can Burger King provide effective monetary relief absent the Franchisees' involvement, but it can provide fully effective injunctive relief. That injunctive relief is as detailed as changing the franchise manager's daily checklist and as broad as ensuring that the restaurants are structurally compliant with the disability access laws on a tri-annual and twenty-year basis.

Moreover, joinder of the Franchisees would be prejudicial to the Plaintiffs. The issues relevant to apportionment of liability between Burger King and the Franchisees are unrelated to Burger King's statutory obligations under the disability access laws and to the BKLs' accessibility. These issues considerably complicate the case that Plaintiffs have brought.

Without separate trials distinguishing between the issues relevant to Burger King's liability to Plaintiffs, and the Franchisees' liability to Burger King, Plaintiffs will be prejudiced

[3] Indeed, Federal Rule of Civil Procedure 12(b)(7), under which Burger King brings the Motion to Add Franchisees, refers only to failure to join a party under Rule 19, not Rule 20.

because they will be forced to expend time and resources to litigate a number of issues that are completely irrelevant to their case, several of which will not arise if they do not prevail against Burger King. These include, for example: what portion of the damages liability should be apportioned to the Franchisees versus Burger King; whether class certification should be granted as to the Franchisees; whether the Franchisees are independently liable under state law; and whether the BKLs' inaccessibility was the result of Burger King's negligence.

As can be seen from the *Newport* suit and counter-suit, there are multiple issues relating solely to the lease, Franchise Agreement, and guarantee that are irrelevant to this lawsuit, which addresses only whether the restaurants are or were not in compliance with the law and whether Burger King, as lessor/lessee, is legally responsible for any non-compliance. [4]

3. If the Court Grants Burger King's Motion, the Court Should Order Separate Trials.

If the Court determines that the Franchisees should be joined, Plaintiffs request that the Court order separate trials under Federal Rules of Civil Procedure 20(b) and 42(b). Under Rule 20(b), the Court "may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim." Additionally, under Rule 42(b), "[f]or convenience, to

[4] Burger King and the Franchisees have disparate liability with respect to the Plaintiffs. Burger King and the Plaintiffs entered into a tolling agreement, which extends Burger King's liability to 2006. The Plaintiffs have no such tolling agreement with the Franchisees, and so the statute of limitations applicable to any claims against the Franchisees is two years. Burger King renovated the BKLs from 2008-2010 in an attempt to resolve the issues in *Castaneda*. Although Plaintiffs believe the restaurants remained non-compliant as of February 14, 2011, when they filed this lawsuit, and that injunctive relief is necessary both from a structural and a policy perspective, the 2008-2010 remodels considerably change the scope of injury to the class. These different facts applicable to Burger King, on one hand, and the Franchisees, on the other, result in differing potential damages. While the Franchisees would only be liable for damages from 2009 to the present, Burger King is liable for an additional 3 years.

If the Court believes the Franchisees *should* be joined, prior to preparing a new complaint, Plaintiffs must know when and to what extent the restaurants were modified pursuant to Burger King's efforts related to *Castaneda*. *See* Fed. R. Civ. P. 20(b). Plaintiffs therefore would require production of all surveys and scopes of work relating to the BKLs. *See Castaneda v. Burger King Corp.*, 259 F.R.D. 194 (N.D. Cal. 2009) (Larson, J.).

avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." *See also E.E.O.C. v. Lilja Indus. Const. Corp.*, 1992 WL 532168, at *2 (N.D. Cal. 1992) ("If during the remedy stage of this litigation it appears [the franchisees] may be impacted, the[y] may be given notice and permitted to intervene."). As explained above, such prejudice exists.

Plaintiffs suggest that the first trial would determining Plaintiffs' rights as to Burger King. If Plaintiffs prevail, the second trial would address Burger King's rights concerning the franchisees.

C. The Limited-Barrier Class Should Not Be Dismissed.

Next, Burger King argues that the Plaintiffs do not have standing to assert claims against Burger King for BKLs they did not visit prior to filing the lawsuit. Plaintiffs have pled a limited-barrier class against Burger King for all Remaining BKLs. This proposed class does not cover *all* possible barriers at all Remaining BKLs, but rather only the width of accessible parking spaces and access aisles, excessive door force, lack of or obstructed accessible routes, and/or customer self-service dispensers. Complaint ¶ 41. Plaintiffs have also pled subclasses regarding all barriers at each of the BKLs that a named Plaintiff has visited. Burger King does not seek to dismiss any claims relating to those BKLs or subclasses. Ultimately, this portion of Burger King's motion would only affect nineteen of the eighty-six Remaining BKLs at issue, that is, those that no named plaintiff has visited.

In seeking to dismiss Plaintiffs' limited barrier class, Burger King relies on this Court's opinion in *Castaneda II*, in which the Court declined to certify classes for BKLs not visited by the named Plaintiffs. Burger King ignores four significant reasons that compel a denial here: (1) Plaintiffs seek a different class than that sought in *Castaneda*; (2) the Court denied Burger King's *Motion to Dismiss* in *Castaneda* on legal grounds that remain good law today; (3) the Court's ruling with respect to class certification in *Castaneda* was not a ruling relating to standing, but rather commonality, typicality, and manageability—whether Burger King had an "affirmative centralized plan calling for the alleged barriers at different stores," *Castaneda II*, 264 F.R.D. at 567; and (4) subsequent to the class certification decision in *Castaneda*, certain

facts, discussed above, have demonstrated Burger King's ability to address and policy of not addressing the ADA on a uniform basis with respect to all BKLs and how that impacts inaccessibility across all Remaining BKLs.

1. The BKL-Wide Class Alleged Here Is Limited.

Although Burger King does not acknowledge it, and although it is not properly addressed prior to Plaintiffs' motion for class certification, in response to the Court's concerns regarding manageability of the issues relating to accessibility, Plaintiffs have not sought a single class relating to all barriers at all remaining BKLs, as was initially sought in *Castaneda*. Instead, they have attempted to follow the Court's guidance in *Castaneda*. First, they have pled sixty-seven separate subclasses, for each BKL that they visited prior to the time the Complaint was filed. Second, they have pled a single, limited-barrier class addressing all Remaining BKLs, but only with respect to certain architectural barriers that they allege are common throughout Burger King's system. These barriers are: (1) width of accessible parking spaces and access aisles, (2) excessive door force, (3) lack of or obstructed accessible routes, and/or (4) customer self-service dispensers. This limited-barrier class limits the manageability concerns articulated by the Court in *Castaneda II*. Although Plaintiffs assert that all of the access barriers are the result of Burger King's policy of delegation and neglect with respect to the accessibility laws, these barriers in particular result in a common experience of discrimination throughout the California BKLs.

2. Plaintiffs Have Alleged the Existence of Common Barriers and Common Policies Sufficient to Assert Claims Against all Remaining BKLs.

Burger King brought a substantially similar motion to dismiss in *Castaneda*, and the Court denied it. As the Court explained: "Article III standing for ADA claims is not inherently site specific." *Castaneda I*, 597 F. Supp. 2d at 1041. For ADA claims, "[a]llegations that a plaintiff has visited a public accommodation on a prior occasion and is currently deterred from visiting that accommodation by accessibility barriers establish that a plaintiff's injury is actual or imminent." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1041 (9th Cir. 2008). Here, Plaintiffs seek declaratory and injunctive relief in the ADA claims and minimum statutory damages (as well as

injunctive relief) in the state claims. As in *Castaneda*, the Complaint "alleges the existence of several common barriers among the leased restaurants . . . [which] arise from various common policies." *Castaneda I*, 597 F. Supp. 2d at 1043. Although, ultimately, the Court held that the lack of common prototypes compelling discrimination made certification of a state-wide class improper under Rule 23(a)(2), (3) and (b)(2), the Court did *not* hold that there was no common policy. *Castaneda II*, 264 F.R.D. at 566-72. Instead, the Court held that, in the absence of common *blueprints* or compelled non-compliance with the ADA, difficult individualized issues predominated, which would make statewide adjudication difficult. *Id.* at 566-67.[5] None of these considerations relates to standing and none of them is capable of resolutions on the *pleadings*.

3. Rule 23—Not Article III—Will Dictate the Scope of Class Claims.

Defendant argues that Plaintiffs do not have standing to bring claims concerning restaurants that they have not visited. This argument misses the point. The claims in this case concerning restaurants that the named Plaintiffs have not visited are not based on their individual standing, but rather on the standing of the class as a whole. Whether this is proper is judged by the requirements of Rule 23, not Article III of the United States Constitution.

"Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." 1 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 2:7 (4th Ed., updated 2008). Here, the question is not whether Plaintiffs have individual standing as to the restaurants they have not visited, but rather whether their claims are sufficiently similar to those of individuals who encountered discrimination at those restaurants to support class certification and, ultimately, an injunction requiring BKC to bring those restaurants into compliance.

[5] Although Plaintiffs respectfully disagree with the Court's reading of Rule 23, they have not simply brought the same claims for the same class as *Castaneda*. Instead, Plaintiffs have attempted to accommodate the Court's concerns while still serving the interests of their clients in remedying Burger King's discrimination statewide.

Burger King relies on two decisions from the District of New Jersey.[6] Both of these decisions held that there is no *individual* standing as to restaurants that an individual plaintiff has not patronized. *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 226, 230 (D.N.J. 2003); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343-44 (D.N.J. 2003). In both cases, however, the court held that it was premature to resolve the question of the scope of an eventual plaintiff class action. *See McDonald's*, 213 F.R.D. at 226; *Burger King*, 255 F. Supp. at 345.[7]

The Ninth Circuit addressed this question in *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001). In that case, a handful of prisoners with various disabilities represented a class challenging accommodations and physical barriers at facilities around the state where parole-related proceedings took place. *Id.* at 854, 858-59. The district court had entered a system-wide injunction; on appeal, the defendants argued that any relief should have been limited to the named plaintiffs, as those plaintiffs "failed to demonstrate standing for 'each type of relief sought.'" *Id.* at 860, 867. The Ninth Circuit held that when considering the scope of relief, it was the standing of the entire class that mattered.

> [W]hen a class is properly certified, the injury asserted by the named plaintiffs at the standing stage of our inquiry is asserted on behalf of all members of the class. Accordingly, although in a class-action lawsuit, as in any other suit, "the remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established," the "plaintiff" has been broadened to include the class as a whole, and no longer simply those named in the complaint.

Id. at 871 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). In this case, if a class is properly certified, this Court will be empowered to order relief as to any noncompliant restaurants encompassed within the class definition.

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[6] In *Castaneda*, as here, Burger King relies heavily on these two decisions. In *Castaneda I*, the Court rejected the applicability of these decisions to a case such as this one. 597 F. Supp. 2d at 1043-44.

[7] As the Court discussed in *Castaneda I*, *Moreno v. G&M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000), is inconsistent with all other case law and discussed *prudential* rather than Article III standing in holding that the ADA is "site specific." *Castaneda*, 597 F. Supp. 2d at 1044. *Moreno* also distinguished *itself* by stating that it was an individual, rather than a class action. 88 F. Supp. 2d at 1117.

4. Plaintiffs Have Standing to Assert the Claims Against all BKLs and Have Suffered the Same Legal Injury as the Class they Seek to Represent.

Burger King also misconstrues the requirements of standing. Burger King first attempts to expand the standing requirement by reading the term "claim" too narrowly. Burger King argues that "at least one named plaintiff must have suffered the injury that gives rise to *each* claim asserted." Def. Mem. at 19. None of the cases cited stands for the proposition that a claim is site specific, and as explained above, the ADA is not site specific. Rather, as the Court explained in *Castaneda I*, the cases address whether individuals suing to enjoin a *policy* that has injured them may also sue to enjoin other *policies* that have not caused them injury. *Castaneda I*, 597 F. Supp. 2d at 1044-45 (discussing *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) (holding that plaintiffs lacked standing to assert types of injuries that they had not suffered)); *see also Warth v. Seldin*, 422 U.S. 490, 504 (1975) (holding that connection between defendants' conduct and plaintiffs' injury was too attenuated); *O'Shea v. Littleton*, 414 U.S. 488, 494-95 (1974) (holding that plaintiffs-respondents had not suffered a deprivation of constitutional rights from alleged illegal conduct of petitioners). Plaintiffs have pled a claim for discrimination against Burger King for inaccessibility of Remaining BKLs. They therefore have, not just one, but twenty-seven named Plaintiffs who have suffered the injury giving rise to that claim.

Burger King also reads the requirement of "same legal injury" too narrowly. Burger King's argument that "Plaintiffs' class representational standing is limited to representing the class of people who suffered the same legal injury," Def. Mem. at 20, simply underscores the fact that the question should be addressed through Rule 23 rather than Article III: The question of what constitutes the "same legal injury" will be answered by the commonality and typicality inquiry under Rule 23(a)(2) and (3). In any event, Burger King's attempt to limit "same legal injury" to injuries suffered due to barriers only at the precise stores Plaintiffs visited goes against the Ninth Circuit's instruction in *Armstrong* that "[w]hen determining what constitutes the same type of relief or the same kind of injury, we must be careful not to employ too narrow or technical an approach." 275 F.3d at 867.

Several courts have addressed this question in the context of Title III classes. For example, in *Arnold v. United Artists Theatre Circuit, Inc.*, the court addressed it under the rubric of typicality, *see* Fed. R. Civ. P. 23(a)(3), holding that four named plaintiffs who had patronized a handful of movie theaters had claims typical of a class of theater patrons with disabilities challenging barriers at seventy theaters: "these named plaintiffs possess the same interests, *have suffered the same alleged injuries*, and rely on the same legal theories as the other members of the proposed class." 158 F.R.D. 439, 450 (N.D. Cal. 1994) (emphasis added). Similarly, the court in *Ambulatory Surgery*, in certifying a nationwide class of individuals with all types of disabilities challenging barriers in hundreds of medical facilities, held that, "the representative Plaintiffs have the same interests and *suffer the same injuries* as the class members in that they are allegedly denied access to the same facilities as the class members and discriminated against as the result of the continued existence of physical barriers to access." *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 528 (S.D. Fla. 2000) (emphasis added). These cases further demonstrate that the proper place for an analysis of whether the limited-barrier class can be asserted against all Remaining BKLs is at the class certification stage. For the standing analysis it is enough to demonstrate that Plaintiffs suffered the same legal injury as the class they hope to represent: Denial of access to BKL restaurants caused by physical barriers to customers who use wheelchairs and scooters.[8]

For this reason, Burger King's citation of *Blum v. Yaretsky*, 457 U.S. 991, 999-1002 (1982), misses the point. In *Blum*, the plaintiffs alleged an injury that involved a deprivation of protected property interests and certain specific procedures. The Supreme Court did not permit them to assert a speculative injury that would result in an *increase* in Medicaid benefits and a different set of specific procedures. *Id.* at 1001-02. The two injuries alleged were completely different. Here, in contrast, the injury alleged is of a specific and uniform type—lack of full and

[8] Regardless of the Court's ultimate decision regarding the *cause* of the injury (Burger King's policy of neglect, and to what extent specific barriers play a role in that injury), the injury itself, as explained above, is the same. That is what Article III examines.

equal access due to one of a handful of specific barriers—and is common to all wheelchair and scooter users throughout California who attempt to patronize BKLs.[9]

Burger King has an affirmative obligation to ensure compliance with the ADA. *See Botosan*, 216 F.3d at 833; 28 C.F.R. § 36.201(b). Burger King "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(3)(i). Its alleged policy of delegation and neglect is therefore an affirmative wrongdoing properly addressed state-wide.[10]

5. Subsequent Developments Demonstrate Burger King's Common Control.

Although the Court ultimately determined in *Castaneda* that the case should proceed with subclasses relating to each of the BKLs visited by the *Castaneda* named Plaintiffs, developments subsequent to that order have further demonstrated Burger King's control and uniform approach to the ADA. As explained at length above, the *Castaneda* settlement agreement addressed

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[9] Similarly, Burger King's citation of cases relating to "form of relief" do not support its argument that Plaintiffs do not have standing to seek relief relating to BKLs they have not visited. Rather, those cases merely state that Plaintiffs cannot seek *forms of relief* that the statute permits only the government to seek. Def. Mem. at 22-23. Plaintiffs seek declaratory and injunctive relief under the ADA, which is undeniably permissible.

[10] Although it is premature to discuss class certification, such a policy of inaction is sufficient to establish commonality under Rule 23(a)(2). *See Walters v. Reno*, 145 F.3d 1032, 1045-46 (9th Cir. 1998) (holding that a policy of failing to adequately inform people of their rights resulted in "constitutionally deficient policies and procedures" such that, even though each class member may experience discrete results, there were common questions of law or fact); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120-21 (C.D. Cal. 2008) (finding commonality where plaintiffs alleged inadequate policies or lack of policies); *Californians for Disability Rights v. California Department of Transportation*, 249 F.R.D. 334, 345-46 (N.D. Cal. 2008) (an allegation of the "use of improper design guidelines and the failure to ensure compliance with even those deficient guidelines" was sufficient to establish commonality). It is also sufficient to certify a class under Rule 23(b)(2). Fed. R. Civ. P. 23(b)(2) advisory committee notes (1966) ("Action *or inaction* is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.") (emphasis added); *see Rodriguez v. Hayes*, 578 F.3d 1033, 1051 (9th Cir. 2009) ("The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)."); *Walters*, 145 F.3d at 1047 (discussing rule 23(b)(2)).

compliance with the disability access laws across all ten BKLs at issue in that case. Moreover, Burger King amended its central policies to implement enforcement of the disability access laws and ensure compliance with those laws across the board. The amendment of policies and centralized management of compliance with the disability access laws constitutes "model" injunctive relief for alleged violations of the ADA. It also demonstrates Burger King's centralized policy that has led to noncompliance with the disability access laws. This common control—which the *Castaneda* settlement makes more evident—demonstrates that Burger King's "offending policy or design gave rise to more than one violation, [and therefore] reversing the policy should eliminate more than one barrier." *Castaneda I*, 597 F. Supp. at 1043.

V. CONCLUSION

For all of the reasons set forth above, the Court should deny Burger King's Motion to Dismiss and to Add Franchisees/Lessees as Additional Defendants.

Respectfully submitted,

Dated: April 14, 2011 By: /s/ Julia Campins

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